#2601 signed 5-23-03

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
LST PUBLISHING, INC.	**CASE NO. 00-40087-7**
	CHAPTER
DEBTOR.	
LST PUBLISHING, INC.	
PLAINTIFF,	
v.	**ADV. NO. 00-7126**
RONALD K. LOWER, LEE LOWER, and THE ESTATE OF ANNA MARIE LOWER d/b/a THE ADVOCATE OF PHILLIPS COUNTY,	
DEFENDANTS.	

ORDER ON SUMMARY JUDGMENT MOTIONS

This matter is before the court on the plaintiff's motion for summary judgment on Count I of its first amended complaint and a motion for summary judgment on Counts I, II, and III of that complaint filed by one of the defendants, the estate of Anna Marie Lower ("the Estate"). The plaintiff appears by counsel Tom R. Barnes II and Todd A. Luckman. The Estate appears by counsel William E. Metcalf. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

LST Publishing, Inc. ("LST"), is a Kansas Corporation that publishes a newspaper known as the Phillips County Review ("the Review"). In January 2000, LST filed a voluntary Chapter 11

bankruptcy petition. At that time, Ronald K. Lower ("Ron Lower") was a principal shareholder and the president of LST. His wife, Lee Lower ("Lee Lower"), worked with him at the newspaper. On July 19, 2000, LST converted the case to Chapter 7.

At a hearing on August 2, 2000, (as shown by a transcript of the hearing), Ron Lower's attorney stipulated that at a time specified only to have been before July 20, 2000, Mr. Lower had embarked on a course of conduct intended to thwart efforts for continued publication of the Review. The attorney stated that Ron Lower would stipulate to the following facts (among others): Ron Lower took layout sheets from LST for its July 20th edition of the Review. He also took LST's subscription list and used it to prepare a mailing list for another newspaper, the Advocate of Phillips County ("the Advocate"), that his mother started publishing about that time. He took four computers from LST, including software and data, but returned them late on July 20. He consented to a judgment of $4,200 in favor of the Chapter 7 trustee on the trustee's motion to find him in contempt. After the attorney recited the stipulations, Ron Lower was sworn as a witness. He agreed that he had heard what the attorney had said. When he was asked, "Do you agree with those terms and acknowledge them and agree to abide by them?," he responded, "I do."

A woman who apparently worked for both the Review and the Advocate testified in a deposition that, to her knowledge, the Review's subscription list was kept on an old computer that was not taken to the Advocate and, although the subscription lists were "not really [her] department," she was not aware of any subscription list being taken from the Review and used at the Advocate.

Ron Lower admitted that subscriber information is valuable to a newspaper and would not be revealed to potential competitors. He conceded that, as president of LST, he would not have allowed a competitor to use the Review's subscriber list.

Ron Lower still published and distributed the July 20, 2000, edition of the Review. On the front page, he included a story announcing the establishment of a new newspaper, the Advocate. The story said two sets of stockholders involved in management of the Review could not come to an agreement, so "publishing of The Phillips County Review will cease with this issue under the management of Ron and Lee Lower." It said the Lowers "and the newspaper staff" had resigned from the Review and were going to work for the Advocate at a specified location. In addition, the story said, "All paid Review subscriptions will be honored through their expiration date at the expense of The Advocate."

In a deposition, Lee Lower testified that the Review had about 1,700 subscribers, and that the Advocate mailed out between 700 and 800, although no dates were specified when these figures would have been true. Lee Lower, who had been responsible for the subscription list at the Review, claimed that she used some mailing labels that had been discarded by the Review, the telephone book, and her memory of the names of subscribers to the Review to develop a subscription list for the Advocate. She added that they kept a notebook at the Advocate's office where visitors who were interested in subscribing could write their names and addresses.

Mr. Lower's mother, Anna Marie Lower ("A.M. Lower"), officially established the Advocate on July 20, 2000, by transferring $20,000 from a certificate of deposit into a checking account for the paper's use. The first issue of the Advocate was published one week later. A.M. Lower owned the

paper and Ron Lower ran it for her, and later for the Estate. The following month, A.M. Lower bought a vehicle for the Advocate, and several months after that, she filed a request for a taxpayer identification number in her name d/b/a the Advocate of Phillips County. A.M. Lower knew nothing about the operations of the Advocate, and Ron Lower never told her he used any material from the Review to generate a subscription list for the Advocate.

On June 30, 2000, Denis Miller,[1] who is another stockholder of LST and also one of its creditors, filed a Chapter 11 disclosure statement and plan that called for the sale of the Review to Luke Brown, who was already the publisher of a newspaper in another Kansas town. Brown offered to pay $200,000 for the Review. Among other things, his offer included this condition:

> Former publisher of Phillips County Review agrees that he and persons employed in his behalf will not engage in the newspaper or printing business nor sell advertising in Phillips County, Kansas nor within 25 miles thereof, for a period of 5 years from the date hereof, without written permission of purchaser.

When the case was converted shortly after Miller filed his plan, the Chapter 7 trustee made arrangements for Brown to operate the Review. Brown published the paper for five weeks. He testified that Ron Lower's actions in removing various items from the Review's offices made publishing the paper much more difficult than it would have been had the items been left in place. For example, the Review was the legal publication of record in Phillips County, and by removing the layout sheets and other materials, Ron Lower made it more difficult for the paper to publish the legal notices that had to be printed in the issue after the July 20 one. (The Estate suggests any legal notices that required

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[1]In some of the pleadings, Miller's first name is spelled "Dennis." However, on an affidavit, the name is spelled "Denis" just below his signature, so the Court assumes this is the correct spelling.

continued publication "could have been taken" from previous editions of the Review, but cites nothing in the record to support this assertion.) Brown also testified that a newspaper's subscription list is proprietary information that he would guard very carefully. He indicated that but for Ron Lower's actions, the paper would have been more successful during the five weeks that he published it and he would have remained interested in buying the Review. However, in other testimony, he also said he could not imagine any circumstances under which he would have bought the paper without a non-compete agreement from Ron Lower. At some later time, a man named Bruce Bair offered to buy the Review for $10,000, but the Chapter 7 trustee for LST's case declined the offer.

On November 7, 2000, LST's bankruptcy estate filed the complaint that commenced this adversary proceeding. It amended the complaint about five weeks later. As amended, the complaint asserted three claims against A.M. Lower: (1) converting to her own use LST's equipment, trade secrets, and other property; (2) misappropriating LST's trade secrets, including customer lists, paper layout sheets, and ad layouts, and using them for her own newspaper; and (3) tortiously interfering with LST's relationship with a potential purchaser and its expectancy of continued operation. Eventually, LST made clear that its claims against A.M. Lower were based on the common-law doctrine of *respondeat superior*, that is, vicarious liability for Ron (and perhaps Lee) Lower's actions while acting as her employee. In September 2001, then-Bankruptcy Judge Julie A. Robinson granted A.M. Lower's motion for summary judgment on parts of the first two claims, but otherwise denied the motion.

A short time later, the Court issued an order directing Ron and Lee Lower to show cause why judgment should not be entered against them for repeatedly failing to appear and defend in this

proceeding. Ultimately, a judgment by default was entered against them, although the issue of damages was reserved until the Court could hear evidence on that question.

After the proceeding was reassigned to the undersigned judge, at a pretrial conference and in a resulting scheduling order, the Court directed LST to file a brief concerning its claim for interference with business advantage, and for A.M. Lower to file a response to that brief as well as her own motion for judgment on the trade secrets and conversion claims. The parties completed those briefs some time ago. A.M. Lower passed away on July 21, 2002, and her Estate has now been substituted for her as a defendant in this proceeding.

DISCUSSION AND CONCLUSIONS

Federal Rule of Civil Procedure 56, governing grants of summary judgment, is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) provides that this Court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."[2] An issue of fact is genuine if the evidence is sufficient for a reasonable factfinder to return a verdict for the nonmoving party.[3] The moving party bears the initial burden to show that there is no genuine issue of material fact.[4] Once the moving party meets that burden, the burden shifts to the nonmoving party to demonstrate that

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[2]*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[3]*Id.*

[4]*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."[5] At that point, the nonmoving party may no longer rest on its pleadings but must present evidentiary materials showing that specific factual disputes exist. The Court must consider the record in the light most favorable to the party against whom summary judgment is sought.[6] Where different ultimate inferences may properly be drawn, summary judgment should be denied. [7]

LST's Summary Judgment Motion

LST responded to the Court's direction to file a brief by moving for summary judgment on its tortious interference claim. "Kansas has long recognized that a party who, without justification, induces or causes a breach of contract will be answerable for damages caused thereby."[8] The *Restatement of Torts, Second* (*"Restatement")*, states the tort of interference with a prospective business advantage or relationship in these terms: "One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for pecuniary harm resulting from loss of benefits of the relation, whether interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b)

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[5]*Applied Genetics Int'l, Inc., v. First Affiliated Secs., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990) (citing *Celotex*, 477 U.S. at 324).

[6]*Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied* 469 U.S. 1214 (1985).

[7]*United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986).*

[8]*Turner v Halliburton Co.*, 240 Kan. 1, 12 (1986) (citations omitted).

preventing the other from acquiring or continuing the prospective relation."[9] The Kansas Supreme Court has specified the elements of the tort as follows:

> (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate result of defendant's misconduct.[10]

The existence of Brown's offer, which Ron Lower almost certainly knew about, or perhaps simply the fact, which he certainly knew about, that LST was in a Chapter 7 bankruptcy case in which it would be liquidated, coupled with Ron Lower's stipulated actions, probably satisfy the first, second, and fourth elements of the tort. However, Brown's testimony and actions do not establish either the third or the fifth element as a matter of law. He testified not only that Ron Lower's actions caused him to withdraw his offer to purchase the Review, but also that he would not have gone forward with the purchase without a non-compete agreement from Ron Lower. On the other hand, he took over and published the Review for five weeks after Ron Lower had announced the establishment of the competing Advocate, indicating he might still have been considering buying the Review even though he knew Ron Lower was competing with it. LST does not argue, and has offered no evidence to establish, that Ron Lower would have entered into a non-compete agreement or could have been required to do so. LST has not established that Ron Lower's actions in taking property from it, as opposed to his perhaps permissible competition through publication of the Advocate, necessarily

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[9]*Restatement of Torts, Second*, § 766B, at p. 20 (1979).

[10]*Turner v. Halliburton*, 240 Kan. at 12.

caused it to lose the sale to Brown or have now caused the Review to be completely unsellable. Consequently, the Court must deny LST's request for summary judgment.

The Estate's Motion for Summary Judgment

The Estate makes a variety of attacks on LST's claims. First, it contends that Ron Lower could not have taken anything from the Review after July 19, 2000, and therefore the Estate could have no vicarious liability for his actions because there is no evidence that A.M. Lower established the Advocate before July 20. However, as noted in the facts, the July 20 issue of the Review, presumably distributed on that day, contained the article announcing the establishment of the Advocate. The Court believes that newspaper articles are normally written at least one day before they appear in the paper, so this would constitute some evidence supporting an inference that the Advocate was established before July 20. Furthermore, the article stated that the Lowers and the newspaper staff had tendered their resignations, and told readers where the Advocate would be located. One could easily infer from this information that the resignations likely occurred sometime before July 20, and that someone had probably rented or purchased the facility where the paper would be located and that this likely occurred before July 20 as well. Finally, because A.M. Lower apparently did not form a corporation or other entity to own the paper and hired her son to run the paper, she did not need to do anything more than talk to her son in order to establish the Advocate. Her deposit of money into a bank account was not necessary until the paper actually needed money to begin operations. Instead, the article would indicate that she probably told her son sometime before July 20 that she wanted him to start publishing the Advocate for her, or perhaps that she would establish and finance the paper he might

have asked her to help him start. Even if all three Lowers testified that A.M. Lower did not establish the Advocate before July 20, the factfinder could reasonably adopt a different inference.

The Estate also asserts that LST's conversion claim must fail because, "There is no evidence that any property of the Review was utilized in any way to publish the Advocate except discarded mailing lists."[11] This assertion simply ignores Ron Lower's in-court stipulation that he took the Review's subscription list and used it at the Advocate. The Estate suggests it should not be bound by Ron Lower's stipulations because A.M. Lower was not involved in the contempt hearing and her attorney had no opportunity to cross-examine Ron Lower. Even if the Estate might not be *bound* by the stipulations, the stipulations are *some evidence* of Ron Lower's actions that can be accepted by the factfinder in this proceeding.

The Estate claims that the measure of damages for the wrongful deprivation of the use of personal property is the rental value of the property, relying on *Nelson v. Hy Grade Construction and Materials, Inc.*.[12] In that case, the defendant had taken two conveyors from the plaintiff on the strength of what turned out to be at best an unenforceable oral contract, and the trial court had fixed the plaintiff's damages at a specified monthly amount until he recovered possession, a determination that the supreme court affirmed.[13] What the *Nelson* case actually said about the measure of damages for the wrongful deprivation of the use of personal property was: "The general rule is that the measure of

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[11]Estate's "Brief in Support of Defendant's Motion for Summary Judgment," Pleading no. 101, at p. 18.

[12]215 Kan. 631 (1974).

[13]215 Kan. at 632 & 634-35.

damages for conversion of personal property is the fair and reasonable market value of the property converted at the time of the conversion. [Citation omitted.] It is also the rule in this state that damages for the wrongful deprivation of the use of specific property *may* be measured by its rental value."[14] The decision does not indicate that rental value is the only possible measure of damages. Much of the value of a trade secret is its confidential nature, which is likely to be permanently destroyed when the secret is wrongfully converted, even though a document or other item that physically contained the secret might be returned. The Court believes that a different measure of damages is likely to be appropriate when such property is converted.

The Estate attacks LST's claim for misappropriation of a trade secret on the ground that Ron and Lee Lower did not try to keep the Review's subscription list secret, and that LST's claim concerns only names and addresses contained on damaged sheets of mailing labels that Lee Lower took home rather than throwing in the trash, apparently so she could use the remaining blank, undamaged labels around the house. But Ron Lower testified that he would not have allowed a competitor of the Review to have and use its subscription list, even though that is exactly what he stipulated in open court he had done. This argument also once again ignores Ron Lower's stipulation that he took the Review's subscription list and used it at the Advocate. In addition, the Court questions the validity of the assertion that a business that intended to keep its subscription list secret would never throw away damaged documents containing any part of the list simply because they "could have been picked up out of the

[14]215 Kan. at 635 (emphasis added).

trash by anyone."[15] The Court believes the factfinder could conclude that putting labels containing some subscriber information in the trash does not prove that the information was not intended to be kept secret. The Estate's argument in support of this attack is not convincing.

As another part of its attack on the trade secret claim, the Estate asserts that vicarious liability cannot be imposed on an employer under the Kansas Trade Secrets Act[16] because the act does not expressly provide for it. The only cases that the parties have cited, along with one the Court has found that was decided since the briefs were filed, have held that an employer's vicarious liability for the intentional torts of its employees can extend to liability under three other states' versions of the Uniform Trade Secrets Act.[17] The Court sees nothing in Kansas law to suggest that Kansas courts would reach a contrary conclusion, and therefore rejects this argument.

The Kansas Supreme Court has explained that the modern rationale for vicarious liability is the enterprise justification concept that "the losses caused by an employee's tort are placed on the enterprise as a cost of doing business and on the employer for having engaged in the enterprise."[18] That

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[15]Estate's Brief in Support of Defendant's Motion for Summary Judgment, Pleading no. 101, at p. 19-20.

[16]K.S.A. 60-3320 to -3330.

[17]*See Newport News Industrial v. Dynamic Testing, Inc.*, 130 F.Supp.2d 745 (E.D. Va. 2001); *Infinity Products, Inc., v. Quandt*, 775 N.E.2d 1144 (Indiana App. 2002); *Hagen v. Burmeister & Associates, Inc.*, 1999 WL 31130 (Minn. App. 1999) (unpublished decision), *rev'd on other grounds*, 633 N.W.2d 497 (Minn. 2001) (court of appeals ruling about availability of *respondeat superior* liability under Minnesota Trade Secrets Act not questioned before Minnesota Supreme Court).

[18]*Bright v. Cargill, Inc.*, 251 Kan. 387, 407 (1992).

court has also explained that an employer can be liable even for an employee's intentional tort, such as assault:

> The rule . . . appears to be that if an assault by an employee is motivated entirely by personal reasons such as malice or spite or by a desire to accomplish some unlawful purpose and does not have for its purpose the furtherance of the employer's business, it will be considered personal to the employee and not such as will make the employer answerable. If the assault is committed by the employee while furthering the employer's interest in some way the employer is liable under the doctrine of *respondeat superior*—Let the master answer. Thus we see the relation of the act to the employer's business becomes an important criterion in determining the employer's liability.[19]

The Trade Secrets Act does provide:

> (a) Except as provided in subsection (b), this act displaces conflicting tort, restitutionary and other law of this state providing civil remedies for misappropriation of a trade secret.
>
> (b) This act does not affect:
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> (1) Contractual remedies . . .;
>
> (2) other civil remedies that are not based upon misappropriation of a trade secret; or
>
> (3) criminal remedies . . . .[20]

As the court explained in *Newport News*, however:

> Respondeat superior is not an independent conflicting tort, civil claim or remedy. Rather, it is a legal precept that presupposes the existence of an underlying claim and assesses liability not because of the act giving rise to the claim but because of a certain status. Thus, one cannot bring a claim of 'respondeat superior,' instead one simply relies on this theory as a vehicle for imposing on the principal liability for the underlying wrongful acts of the agent."[21]

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[19]*Williams v. Community Drive-In Theater, Inc.*, 214 Kan. 359, 366 (1974).

[20]K.S.A. 60-3326(a) & (b).

[21]130 F.Supp.2d at 751.

The Court agrees with this analysis, and is convinced that Kansas courts would hold that the common law doctrine of *respondeat superior* can be applied, under appropriate circumstances, to make an employer liable for its employee's violation of the Trade Secrets Act.

The Court is convinced that LST can succeed on its trade secrets claim against the Estate if it can show that Ron Lower misappropriated its trade secret and that the requirements for *respondeat superior* liability under Kansas law are met. LST's claim is that Ron Lower improperly took a trade secret, its subscription list, and used the list in the process of establishing a competing business. That is, LST contends that Ron Lower furthered the Advocate's business by his actions. This claim is a legally sufficient one under the Kansas Trade Secrets Act.

The Estate attacks LST's claim for tortious interference with a prospective business relation on the grounds that LST has not suggested there was any type of communication between A.M. Lower, or anyone acting on her behalf, and a third party that caused the third party to withdraw from the prospective business relation, and that the only identified people who might have bought the Review are Luke Brown, who would not have bought the paper without Ron Lower's non-compete agreement, and Bruce Bair, whose offer was not accepted by LST. The Estate has located statements in federal district court decisions asserting that Kansas law on tortious interference with a prospective business advantage or relationship requires "some type of communication" between the defendant and the third party,[22] and requires that the defendant interfere "with a specific third party with whom the plaintiff has

[22]*D-P Tek, Inc. v. AT & T Global Information Solutions Co.*, 891 F.Supp. 1510, 1520 (D. Kan. 1995), *aff'd on other grounds*, 100 F.3d 828 (10th Cir. 1996).

an existing or expected business relationship."[23] Neither decision cited any authority supporting its suggested limitation of the tort. Kansas state courts have relied on the *Restatement* as authority for claims based on tortious interference.[24] A consideration of relevant portions of the *Restatement* makes clear that the cited descriptions of the tort are too narrow.

As indicated above, *Restatement* §766B describes the tort that LST claims Ron Lower committed as: "One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for pecuniary harm resulting from loss of benefits of the relation, whether interference consists of . . . (b) preventing the other from acquiring or continuing the prospective relation."[25] This means that Ron Lower could be liable to LST for preventing LST from realizing on its prospective contractual relation, even without directly dealing with any third party. Comment e under this section explains that: "If the means of interference is itself tortious, . . . there is no greater justification to interfere with prospective relations than with existing contracts."[26] Section 766A concerns intentional interference with another's performance of his own existing contract,[27] and

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[23]*Arnold v. Air Midwest, Inc.*, 877 F.Supp. 1452, 1465 (D. Kan. 1995), *aff'd on other grounds*, 100 F.3d 857 (10th Cir. 1996).

[24]*See, e.g., Turner v. Halliburton*, 240 Kan. 1, 11-15 (1986) (citing *Restatement of Torts, Second*, §766 and quoting §767 in considering claim of tortious interference with prospective business advantage or relationship); *see also DP-Tek v. AT & T Global Information Solutions Co.*, 100 F.3d 828, 832-33 (10th Cir. 1996) (Relying on *Turner* to support conclusion that Kansas courts would adopt another *Restatement* provision if the question came before them).

[25]*Restatement*, § 766B.

[26]*Restatement*, §766B, comment e at p. 23.

[27]*See Restatement*, §766A, at p. 17

comment g to that section explains: "One may be prevented from performing his contract in numerous ways. Thus he may be physically restrained or intimidated or be excluded from the place where the contract must be performed or be deprived of the necessary equipment or labor."[28]

Under *Restatement* §766B, then, Ron Lower (and through *respondeat superior*, the Estate) can be liable to LST if LST succeeds in showing that his actions prevented LST itself from completing the sale of its business. There is no requirement that Ron Lower communicated with anyone else, such as Luke Brown or Bruce Bair, only that his tortious actions prevented LST from realizing on a prospective sale. In this context, it also seems clear that liability could attach based on actions that prevented LST from completing a sale of its business to any third party at all (the avowed purpose of Ron Lower's actions, as he stipulated in open court), and not necessarily only its sale to some specific third party.

Summary

For these reasons, the Court concludes that each party's motion for summary judgment must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of May, 2003.

[28]*Restatement*, §766A, comment g at 19.

JAMES A. PUSATERI
BANKRUPTCY JUDGE